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[IN THE EXCHEQUER CHAMBER.]

COLE AND ANOTHER v. THE NORTH WESTERN BANK.

*Factors Acts—Agent “intrusted with the Possession of Goods,” within 5 & 6 Vict. c. 39—Agent a Broker and also a Warehouse-keeper, and Goods delivered to him in the latter Capacity.*

A warehouse-keeper who has goods deposited with him as such is not “an agent intrusted with the possession” of them, within the Factors Act, 5 & 6 Vict. c. 39, although he be also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.

One Slee carried on the business of a sheep’s wool broker in Liverpool, and also that of a warehouse-keeper. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep’s wool and goats’ wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorized to sell without specific instructions. The sheep’s wool so deposited with him was usually sold by Slee, and the proceeds received by him for the plaintiffs. The goats’ wool Slee never sold, he not being a goats’ wool broker.

Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:—

*Held*, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that Slee was not, as to any of the wools so agreed to be pledged, “an agent intrusted with the possession,” within the Factors Act, 5 & 6 Vict. c. 39.

Per Blackburn, J.:—The intention of the Factors Act, 5 & 6 Vict. c. 39, was, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance.

Per Bramwell, B.:—The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed.

ERROR upon a judgment of the Court of Common Pleas for the plaintiffs on a special case: Law Rep. 9 C. P. 470.

Feb. 4. *Benjamin, Q.C. (R. G. Williams, Q.C., and Gorst, with him)*, for the defendants, contended that an agent intrusted with the possession of goods, and having an ostensible authority to deal

with them as owner, might, even at common law, and independently of the Factors Acts, confer a good title upon a vendee or pledgee,—*Pickering v. Busk* (1); that the fair inference from the facts stated in the special case was, that Slee was intrusted with the wools in question as a wool-broker, and not as a mere warehouse-keeper (the making of a valuation and report being no part of the duty of a warehouse-keeper), and, though his principals reserved to themselves the right to dispose of them themselves, still it was his usual course of business to sell the sheep's wool at all events and to receive the proceeds, and therefore he appeared to the world as the consignee and owner of the wools, notwithstanding any secret orders to await instructions as to the disposal of them; and that, at all events, he was an agent "intrusted with the possession" of the wools, within the Factors Act, 5 & 6 Vict. c. 39; for, that, if one who ordinarily sells as agent is intrusted with the possession of goods for any purpose, he would have authority to pledge them, and his principals would be bound by his act. And, after an elaborate review of the general policy of the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, and of the progressive changes from time to time effected in the law with regard to the relations between principal and factor, and a criticism of the various decisions which led to those changes, he submitted that the only inference that could reasonably be drawn from the statements in the case was, that Slee's position was such at the time of the pledge made by the letter of the 5th of April, 1872, as to make such pledge valid as against his principals, the plaintiffs. He referred to *Phillips v. Huth* (2); *Hatfield v. Phillips* (3); *Monk v. Whittenbury* (4); *Fuentes v. Montis* (5); *Baines v. Swainson* (6); *Lamb v. Attenborough* (7); *Navulshaw v. Brownrigg* (8); relying especially upon the judgment of Lord Westbury in the case of *Vickers v. Hertz*. (9) As to the second point argued in the Court below, viz. that, at the time of the pledge, Slee had not posses-

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(1) 15 East, 38.

(6) 4 B. &amp; S. 270; 32 L. J. (Q.B.)

(2) 6 M. &amp; W. 572.

281.

(3) 9 M. &amp; W. 647; 12 Cl. &amp; F. 343.

(7) 1 B. &amp; S. 831; 31 L. J. (Q.B.) 41.

(4) 2 B. &amp; Ad. 484.

(8) 2 De G., M. &amp; G. 441; 21 L. J.

(5) Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93.

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(9) Law Rep. 2 H. L., Sc. 113.

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sion of all the wools, *Langton v. Waring* (1) and *Portales v. Tetley* (2) were cited.

Feb. 5. *Herschell, Q.C.* (*W. G. Harrison* with him), contra, contended that an agent had no authority at common law to bind the property of his principal by a pledge; that the present case was neither within the mischief nor the words of the Factors Acts; that the defendants were not induced to advance the money upon the faith of Slee's possession or ostensible ownership of the goods, but acted upon his representation that he had them in his hands; that the fact of the wools having been deposited with Slee as a warehouseman did not give him authority under 5 & 6 Vict. c. 39 to bind his principals by a pledge of them; that, to give him such authority, it must appear that he was intrusted with the possession of the goods as agent for sale, or at least that it was the course of his business as such agent to sell; that the slightest inquiry on the part of the defendants would have disclosed the limited authority under which Slee held the wools; that the transaction of the 5th of April, 1872, did not amount to a pledge, but at the most to a mere contract or agreement to pledge, which might have been defeated by the principals getting back their goods before the transaction was completed; that the defendants could gain no title as against the plaintiffs by their wrongful act in forcibly possessing themselves of the wools in the manner disclosed by the case; that, as to the goats' wool, Slee was clearly never intrusted with them as broker at all; and that, as to the 114 bales of sheep's wool ex *Grecian*, they could not be the subject of a pledge by Slee, inasmuch as they were not in his hands at the time, and he did not profess to pledge the bills of lading, which were. He cited and commented upon the provisions of the Factors Acts, and also the following authorities,—*Wilkinson v. King* (3); *Pickering v. Busk* (4); *Monk v. Whittenbury* (5); *Baines v. Swainson* (6); *Fuentes v. Montis* (7); and contended that the dictum of Lord Westbury in *Vickers v. Hertz* (8) was

(1) 18 C. B. (N.S.) 315.

(2) Law Rep. 5 Eq. 140.

(3) 2 Camp. 335.

(4) 15 East, 38.

(5) 2 B. & Ad. 484.

(6) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(7) Law Rep. 2 C. P. 268; 4 C. P. 93.

(8) Law Rep. 2 H. L., Sc. 113.

founded upon a mistaken notion of the effect of the judgment of Willes, J., in the last-mentioned case.

*Benjamin, Q.C.*, in reply, referred to *Higsons v. Burton*. (1)

*Cur. adv. vult.*

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Feb. 12. BLACKBURN, J. This is a special case on which the Court of Common Pleas gave judgment for the plaintiffs for the sum of 6661*l.* 1*s.* 7*d.* The defendants brought error on that judgment, and the case was argued in the Exchequer Chamber on the 4th and 5th of February last, by Mr. Benjamin for the defendants (the plaintiffs in error) and Mr. Herschell for the plaintiffs (the defendants in error), before my Brothers Bramwell, Mellor, Lush, Cleasby, Pollock, and Amphlett, and myself, when we took time to consider.

The case was stated without pleadings. It did not as originally drawn give express power to the Court to draw inferences of fact: but, on that being pointed out during the argument, it was agreed that it was so intended, and that, if necessary, an amendment should be made, to give that power.

The plaintiffs, merchants in London, were the owners of two parcels of sheep's wool, and two parcels of mohair or goats' wool. All four parcels were received for the plaintiffs by one Slee, a warehouseman and sheep's wool broker at Liverpool, and were by him deposited in his warehouse at Liverpool. From thence they were taken on the 13th of April, 1872, by the defendants, who claimed right so to do under a contract made by Slee on the 5th of April, 1872, by which he pledged, or agreed to pledge, the whole four parcels to the defendants for 7000*l.* then advanced to him by the defendants on that security.

At the time when this contract was made, the two parcels of goats' wool and one of the parcels of sheep's wool were in Slee's warehouse. The other parcel of sheep's wool was still on board the vessel (the *Grecian*) by which it had come: but Slee held the bill of lading, which had been sent to him by the plaintiffs to enable him to land and deposit the wool in his warehouse; and (after the making of the contract of the 5th of April) on the 9th of April this sheep's wool also was actually deposited in the warehouse.

(1) 26 L. J. (Ex.) 342.

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Slee absconded with the 7000*l.* thus obtained, and then the defendants, having notice that Slee had committed this act of bankruptcy, but not having any further notice that he had not been so intrusted with the possession of the goods as to be able to pledge them, took forcible possession of the whole goods against the will of Slee's clerks.

The great question was whether Slee was, under the circumstances, so intrusted with the possession of the goods as to have been able on the 5th of April (supposing he had then delivered actual possession to the defendants) to make a pledge to the defendants good against the plaintiffs. As to this, there is a distinction between the sheep's wool and the goats' wool; for, Slee never sold goats' wool at all, and was clearly intrusted with the goats' wool as warehouseman, and as warehouseman only. But he did sell sheep's wool as a broker.

A broker, who, without being intrusted with the goods, makes a contract between two principals, has no opportunity to pledge the goods at all. But we know (though it is not stated in the case) that brokers often are capitalists who make advances on the goods and have them transferred into their names as a security for such advances. And sometimes, especially where the principal is resident at a distance, the goods are transferred into the broker's name for the purpose of facilitating a sale by him, although there has been no advance made by him upon them. The agent thus intrusted is something more than a mere broker.

A pledge by a person thus intrusted with the possession of goods as broker would no doubt be good. And if, as is sometimes the case, the broker had warehouses of his own in which the goods so intrusted to him were stored, they would be equally in his possession as broker as if they had been stored in the warehouse of another in his name. But we are all agreed that we must understand from the statement in the case that Slee had not warehouses as merely ancillary to his business as broker, but that he carried on two distinct and independent businesses, the one being that of a warehouseman, the other that of a sheep's wool broker: and this raises the first question of fact, viz. whether the goods in question were intrusted to him merely as warehouseman, or also as broker.

It is stated in the case that the bills of lading of the plaintiffs' wool (whether goats' wool or sheep's wool) were in the ordinary course of business sent down to Slee for the purpose of his receiving the wool from the ship and warehousing it. Slee, after the wool had been so received and warehoused, sent up a report and valuation thereon, and then awaited the plaintiffs' further instructions as to disposal. Two sample letters are set out in the Appendix, one relating to goats' wool, the other to sheep's wool; and they bear out the statement in the case that both kinds of wool were treated in exactly the same way.

But there is the further statement that, "as to the sheep's wool, Slee had no general authority from the plaintiffs to sell, but always awaited instructions, and acted only under specific authority given to him from time to time in each case; and, when such last-mentioned sales were effected, Slee received the proceeds."

We draw the inference of fact that, as between the plaintiffs and Slee, Slee was intrusted with the sheep's wool and goats' wool alike, solely for the purpose of warehousing them. But, as it appears that he was sometimes authorized by the plaintiffs to sell and receive payment for sheep's wool deposited in his warehouse, the question arises whether he could make to the defendants a good pledge of any wool (either goats' wool and sheep's wool, or of sheep's wool only, or of neither,) deposited by the plaintiffs in his warehouse, though not intended to be sold.

The Court of Common Pleas decided that the pledge (even supposing it to have been executed by delivery on the 5th of April) would not have been good either as to the sheep's wool or the goats' wool: and we are of opinion that they were right, and that their judgment should be affirmed.

This renders it unnecessary for us to express any opinion on two subsidiary points raised by Mr. Herschell,—first, that the taking forcible and (as he argued) wrongful possession on the 13th of April could not better the defendants' position, who therefore remained in the position (provided for in the 4th section of 5 & 6 Vict. c. 39) of a person who has made a contract for a pledge with an agent, but has not actually received the goods contracted to be pledged,—and, secondly, as to the parcel per *Grecian*,

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that Slee on the 5th of April, when the contract was made, was not in possession of these wools, though he had the bill of lading under which he subsequently obtained them. We merely mention these two points, to shew that we have not overlooked them; but express no opinion on either.

The decision of this case depends, in our opinion, entirely on the true construction of the last of the Factors Acts, 5 & 6 Vict. c. 39, which was passed to amend and extend the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94. We think, however, that, in order to understand 5 & 6 Vict. c. 39, it is necessary to consider what was the common law before any legislation on the subject, what were the provisions of the two earlier Acts, and what had been the judicial decisions upon them.

The amount at stake in the present action is large, and renders our decision of importance to the parties. But the general importance of the question as regards the commerce of this country is even greater. It was for this reason, and not from any doubt as to what the decision should be, that the Court took time to consider their judgment. And for the same reason we now proceed to give our reasons at some length.

The 4th edit. of Abbott on Shipping was published before the passing of either of the Factors Acts. The 5th edit., the last published in the lifetime of the author, was published before the passing of 5 & 6 Vict. c. 39: but it contains a valuable abstract of the two earlier Factors Acts, indicating what Lord Tenterden thought was their effect. The passage containing his opinion has been suppressed in the sixth and subsequent editions of Abbott on Shipping. The 5th edition, in which alone it is to be found, is now out of print: it is worth while, therefore, to quote the whole passage at length: it will be found in part 3, ch. 9, s. 16, p. 381:—

“Lastly, we are to consider by what acts the right of the consignor may be taken away before the end of the transit. Since the publication of the former editions of this book, this subject has received the attention of the legislature, and Acts of Parliament have passed (1) by which the matter will in many cases be governed in future. The legislative enactments are in part con-

(1) 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94.

firmatory of the common law, and in part important alterations of it. The following abstract of them will, it is hoped, be found correct and useful.

“The person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, if he has not notice by the bill of lading or otherwise, at or before the advance or receipt, that such person is not the actual and bonâ fide owner of the goods; and such person shall be taken for the purposes of the Act to have been intrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear. (1) So, also, a person intrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders mentioned in the Act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods or the deposit or pledge thereof, if the buyer, disponer, or pawnee has not notice, by the document or otherwise, that such person is not the actual and bonâ fide owner of the goods. (2) But, if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other, than was possessed by the person making the deposit or pledge. (3) And, further, any person may contract for the purchase of goods with any agent intrusted with the goods, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he shall have notice that the party with whom he contracts is an agent, if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment notice that the agent is not authorized to sell or to receive the price. (4) Also, any person may accept any goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but, in such case, he shall acquire such right, title, or interest, and no further

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(1) 6 Geo. 4, c. 94, s. 1.

(2) 6 Geo. 4, c. 94, s. 2.

(3) 6 Geo. 4, c. 94, s. 3.

(4) 6 Geo. 4, c. 94, s. 4.



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or other than was possessed by the factor or agent at the time of the deposit or pledge. (1)

"It is, however, provided that the Act shall not prevent the true owner of the goods from recovering them from his factor or agent before a sale, deposit, or pledge, or from the assignees of such factor or agent, in the event of his bankruptcy; nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged, upon repayment of the money or restoration of the negotiable instrument advanced on the security thereof to the factor or agent: and upon payment of such further money or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods after deducting the money or negotiable instrument advanced on the security thereof. And, in the case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed shall be held to have discharged pro tanto his debt to the estate of the bankrupt. (2)

"I am not aware that any case has hitherto been decided upon the construction of these enactments. They appear, as I have before observed, to be partly a confirmation and partly an alteration of the law: and, as a knowledge of the former state of the law is often very useful, even after an alteration has been made, it has been thought advisable to retain the contents of the last edition on this subject, with a reference to some subsequent decisions."

We agree with Lord Tenterden in thinking that these acts were partly a confirmation and partly an alteration of the law, and that, to understand them, it is necessary to see what the law was before they were passed.

At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of

(1) 6 Geo. 4, c. 94, s. 5.

(2) 6 Geo. 4, c. 94, s. 6.

fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.

And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods in transitu had the same effect in defeating the unpaid vendor's right to stop in transitu that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.

Lord Tenterden thus states the law (1): "If the goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do: and as, in the case of actual possession, although a factor might sell the goods and thereby bind his principal because his employment and authority are to sell, but could not pawn or pledge them because he is not by his employment authorized so to do, so, before the arrival of the goods, it was held that he could not divest the consignor's right to stop them by indorsing or delivering over the bill of lading as a pledge."

The proposition that a factor is not by his employment authorized to pawn or pledge goods intrusted to him, was for many years much controverted in point of fact. But, it having once been decided as a matter of law that he was not so authorized, the Courts adhered to what had been decided.

(1) Abbott on Shipping, 5th edit., part 3, ch. 9, s. 19, p. 391.

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The law in this respect has been altered by 5 & 6 Vict. c. 39, as will be shewn hereafter : but the legislature did not alter it in the first Factors Act, 4 Geo. 4, c. 83, except in the case of consignments by sea. In *M'Combie v. Davies* (1), the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts.

The general principle of law, that, where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority, to the same extent as if the apparent authority was real, is illustrated by two decisions which probably were present to the minds of those who framed 6 Geo. 4, c. 94. In *Wilkinson v. King* (2), it appeared that one Ellit was a wharfinger, and was accustomed to sell lead from his wharf. It is not distinctly stated in the report whether these sales were solely of his own lead or also of lead sent to him by others to sell as their factor ; but, as it is expressly mentioned that he had never sold any lead for the plaintiff, it appears probable that he sold for others as factor. The defendant bonâ fide bought from Ellit lead belonging to the plaintiff which had been sent to him as wharfinger only. Lord Ellenborough ruled that "Ellit had no colour of authority to sell the lead, and no one could derive title from such a tortious conversion." And several other cases depending on similar sales by Ellit were decided in 1809 and 1810 in the same way. In none of these does there appear to have been any attempt to review in banc the decisions at nisi prius. In *Pickering v. Busk* (3), in 1812, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker and an agent for sale, and the goods were at the plaintiff's desire transferred into the name of Swallow. It was held that this proved that Swallow had an implied authority to sell, and consequently that the defendants were justified in buying of Swallow and paying him the price. Lord Ellenborough goes somewhat further. He says: "If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed

(1) 7 East, 5.

(2) 2 Camp. 335.

(3) 15 East, 33.

that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principals in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not." It is to be observed, however, that the other judges base their judgment on the ground that the circumstances proved in fact an implied authority to Swallow to sell; and that Lord Ellenborough limits his more extensive doctrine to the case of a person "authorizing another to assume the apparent right of disposing of property in the ordinary course of trade," or, in other words, intrusting it to an agent whose business it is to sell: and, on *Wilkinson v. King* (1) being cited on the argument, he says (2): "That was the case of a wharfinger whose proper business it was not to sell, and to whom the goods were sent for the mere purpose of custody:" from whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were intrusted to an agent whose ordinary business it was to sell, in the course of his business as such agent, and because he was such agent. And Le Blanc, J., expressly says (3): "This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell."

Perhaps, however, the case of *Dyer v. Pearson* (4), which was decided in 1824, the year before the passing of 6 Geo. 4, c. 94, is that which throws most light on the intention of the legislature. That was trover for wool. Smith, who had sold the wool to the defendant, had been intrusted by the plaintiffs with the bill of lading, for the purpose of warehousing the goods, which he did in his own name. There was no distinct evidence that Smith was in the habit of buying or selling wool for others; and this was relied on in the argument as distinguishing the case from *Pickering v. Busk* (5), which was not questioned; and it was not contended

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(1) 2 Camp. 335.

(2) 15 East, at p. 42.

(3) 15 East, at p. 45.

(4) 3 B. &amp; C. 38.

(5) 15 East, 38.

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that he in fact had any authority from the plaintiffs to sell. Abbott, C.J., had at the trial left the question to the jury whether the defendant had purchased the wool under circumstances which would have induced a cautious man to believe that Smith had authority to sell. The jury found for the defendant. A new trial was granted; and Abbott, C.J., delivering the judgment of the Court, says (1): "The general rule of the law of England is, that a man who has no authority to sell cannot by making a sale transfer the property to another. There is one exception to that rule, viz. the case of sales in market overt. Now, this being the rule of law, I ought either to have told the jury, that, even if there was an unsuspecting purchase by the defendant, yet, as Smith had no authority to sell, they should find their verdict for the plaintiffs, or I should have left it to the jury to say whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having, not the possession only, but the property; for, if the real owner of goods suffer another to have possession of his property and of those documents which are the indicia of property, then *perhaps* a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendant: and that question, *if it arises upon the evidence*, ought to have been submitted to the jury." The legislature seem to have intended to declare the law in future on the two points on which in that judgment doubt was expressed, and which I have indicated by putting them in italics.

When we look at the language used in the two earlier Factors Acts with reference to this state of the law, it seems to us clear that the legislature intended by 4 Geo. 4, c. 83, to alter the law in favour of consignees, so far as to enact that, where goods were shipped in the names of persons "intrusted for the purposes of sale" with goods, the consignees might advance money on the security of the goods as if the consignors were the true owners, unless they had notice to the contrary; with a proviso (which may have some bearing on the construction of s. 4 of 5 & 6 Vict. c. 39) that the persons in whose names such goods are so shipped shall be taken to have been intrusted therewith, unless the contrary "appear or be shewn in evidence by any person disputing the

(1) 3 B. & C. at p. 42.

fact." And by the 2nd section of that Act, the legislature repealed *M'Combie v. Davies* (1) in so far as it was applicable to those taking pledges from consignees: but that Act did not alter the established law as to pledging, with regard to others than consignors and consignees. The 6 Geo. 4, c. 94, s. 1, re-enacted the 1st section of 4 Geo. 4, c. 83.

We are not in the present case concerned with the rights of consignees, except in so far as the provisions respecting them throw light on the other sections of the Acts. The 2nd section of 6 Geo. 4, c. 94, made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bonâ fide* with the possessor, beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in *Dyer v. Pearson* (2), by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by "persons intrusted with" these documents of title; on which words a construction was put by the Courts in the two cases of *Phillips v. Huth* (3) and *Hatfield v. Phillips*. (4)

The 5 & 6 Vict. c. 39, in consequence of these decisions, altered the law as to what should constitute intrusting. The 2nd section of 6 Geo. 4, c. 94, also contained a proviso that the purchaser or pledgee had not notice, by the documents or otherwise, that the seller or pledgor was not "the actual and *bonâ fide*" owner of the goods sold or pledged,—a proviso which, especially after the decision of *Fletcher v. Heath* (5), rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This also has been altered by 5 & 6 Vict. c. 39. But, in the 4th section of 6 Geo. 4, c. 94, the language used by the legislature is completely changed. It does not in this section give any power to pledge at all; nor does it use the language of the 2nd section, and authorize "any person

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(1) 7 East, 5.

(3) 6 M. &amp; W. 572.

(2) 3 B. &amp; C. 38.

(4) 9 M. &amp; W. 647; 12 Cl. &amp; F. 343.

(5) 7 B. &amp; C. 517.

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COLE not having notice that this person is not the true owner: but it  
v. enacts that it shall be lawful to contract with "any agent"  
NORTH intrusted with any goods, or to whom they may be consigned, for  
WESTERN the purchase of such goods, and to pay for the same to "such  
BANK. agent;" and such sale and payment is to be good, notwithstanding  
the purchaser has notice that the party selling or receiving pay-  
ment is only an agent; provided such contract or payment is  
made in the usual course of business,—a proviso which by itself  
alone shews that the legislature meant by the word "agent" only  
such agents as in the usual course of business sell goods for their  
principals and receive payments, such as factors, brokers, &c., and  
did not mean to include bailees, warehousemen, carriers, and  
others who may in one sense no doubt be called agents, but who  
do not sell or receive payment for goods intrusted to them by  
those employing them. It therefore solves the second doubt in  
*Dyer v. Pearson* (1), by declaring that, if the evidence should be  
such as to shew that the person in possession of the goods was  
intrusted as "an agent," a sale by him should bind the true  
owner.

Then follows a further proviso, that the person dealing with the agent has not notice that the agent is not authorized to sell or receive payment. This latter proviso shews that the framer of the Act remembered that a factor might, as between him and his principal, be restrained from selling except on particular terms, or possibly forbidden to sell at all, and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had not notice of this restriction, but bad as regards those who had.

It seems to us, therefore, that the legislature by this section intended to confirm (to use Lord Tenterden's expression) the common law as laid down in *Pickering v. Busk* (2), but did not mean to extend it to all cases in which any person is intrusted with the custody of goods, though that person may in one sense be an agent for the intruster. And it seems to us that, on the construction of the Act, and without reference to authority, it must be intended to apply only to cases in which the intrusting is in the

(1) 3 B. &amp; C. 38.

(2) 15 East, 38.

course of that kind of agency, so as to create the relation of principal and agent between the intruster and the intrusted. In effect, that the decision in *Wilkinson v. King* (1) was not overruled or shaken in *Pickering v. Busk* (2), and was not intended to be affected by the legislature. For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted as tenant with the furniture, being in fact an auctioneer: but it never was the common law, and could not be intended to be enacted, that, if he carried the furniture to his auction room and there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny, as a fraudulent bailee: nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell.

This was the construction put upon the Act in *Monk v. Whittenbury* (3), decided in 1831; and that decision has never been questioned. That decision was before 5 & 6 Vict. c. 39: and the legislature might easily have altered the enactments, if they had been so minded, so as to avoid the effect of that decision, as they did alter them so as to avoid the effect of other decisions.

The 5 & 6 Vict. c. 39, commences with a preamble; and though, of course, the enacting part may either go further than or fall short of effecting what is recited in that preamble as being the object of the legislature, that preamble is of great importance. It first recites that, under 6 Geo. 4, c. 94, "and the present state of the law, advances cannot safely be made upon goods or documents of title to persons known to have possession as agents only." This points to *Fletcher v. Heath* (4), and shews an intention to alter the law as there decided. It then recites that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be

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(1) 2 Camp. 335.

(2) 15 East, 38.

(3) 2 B. &amp; Ad. 484.

(4) 7 B. &amp; C. 517.



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extended to bonâ fide advances upon goods and merchandise as by the said recited Act is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the security thereof."

This recital shews a plain intention to enact that what had, ever since the case of *Paterson v. Tash* (1), been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not power to sell; nor to extend the power to sell beyond that which by the common law and 6 Geo. 4, c. 94, s. 4, was given; nor to alter the construction put upon that enactment by the decision in *Monk v. Whittenbury*. (2)

There is a further recital, that the Act does not extend to protect exchanges of securities bonâ fide made. This refers to *Taylor v. Kymer* (3) and perhaps *Bonzi v. Stewart* (4), though that latter case (after very protracted litigation) was not decided till a few weeks before 5 & 6 Vict. c. 39 received the Royal assent, and this recital shews an intention to alter the law as there decided.

There is no express recital pointing to the decision in *Phillips v. Huth* (5), and the case of *Hatfield v. Phillips* (6), which had then been decided in the Exchequer Chamber and was still pending in the House of Lords; but, from the enactment in the 4th section, it is plain that these cases were in contemplation, and that it was intended to alter the law as laid down in those cases.

The legislature then proceed in the first section to enact that "any agent" who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, may pledge the same. The legislature, it is to be observed, does not use the words "person intrusted," which are those used in the 2nd section of 6 Geo. 4, c. 94, but "agent intrusted," being the words used in

(1) 2 Str. 1178.

(2) 2 B. & Ad. 484.

(3) 3 B. & Ad. 320.

(4) 4 M. & G. 295.

(5) 6 M. & W. 572.

(6) 9 M. & W. 647; 12 Cl. & F. 343.

the 4th section of the Act, on which words a judicial construction had been put in *Monk v. Whittenbury*. (1)

The 2nd section alters the law as declared in *Taylor v. Kymer*. (2) The 4th section alters the law as laid down in *Phillips v. Huth* (3), by enacting "that any agent intrusted as aforesaid and in possession of any such documents of title, whether derived immediately from the owner of such goods or obtained by reason of such agent's having been intrusted with the possession of the goods or of any other document of title, shall be deemed and taken to be intrusted with the possession of the goods:" . . . "and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence." It is not necessary to notice any other parts of the Act.

Mr. Benjamin argued that the object of the legislature was, to afford facilities for safely making advances; and that this object was only imperfectly carried out if an advance made under such circumstances as the present was not protected. He argued that the defendants had no means of knowing whether Slee was possessed as a warehouseman or as a broker. As far as regards the mohair, this argument fails in fact; for, a very little inquiry would have made the defendants aware that Slee was not a broker for mohair at all. As regards the sheep's wool, however, there is force in the argument that the defendants might, without much negligence, be led by Slee to believe that he was intrusted with the sheep's wool as a broker. But, if the plaintiffs knew that the warehouseman whom they trusted was also a wool-broker, the defendants were aware that the wool-broker whom they trusted was also a warehouseman; and there seems no reason why without inquiry they should think he was intrusted in one capacity rather than the other.

Probably 5 & 6 Vict. c. 39, s. 4, requires us to treat him as being so intrusted, unless the contrary is shewn in evidence. But we are all of opinion that in this case the plaintiffs have shewn in evidence that Slee was not intrusted as broker, but

(1) 2 B. & Ad. 484.

(2) 3 B. & Ad. 320.

(3) 6 M. & W. 572.

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solely as warehouseman. We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done.

The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can shew that he was misled by the act of the true owner. The legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the Act, we think they have not used language sufficient to express an intention so to enact.

Hitherto we have been considering the statute 5 & 6 Vict. c. 39 as if we had to construe its language for the first time, without the assistance of any decided cases. We think, however, that every case that has been decided since the passing of the statute confirms our view. In *Wood v. Rowcliffe* (1), Wigram, V.C., held that a person intrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner, was not an agent within the meaning of the Act, and consequently could not make a good pledge. In *Lamb v. Attenborough* (2), it was held that a clerk, who as such was possessed of delivery orders, was not an agent intrusted within the meaning of the Act, and could not make a good pledge. In *Heyman v. Flewker* (3), Willes, J., in delivering judgment, says that what the cases decide

(1) 6 Hare, 183.

(2) 1 B. & S. 831; 31 L. J. (Q.B.) 41.

(3) 13 C. B. (N.S.) 519; 32 L. J. (C.P.) 132.

"may be stated thus,—that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name." So, it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent: *Jenkyns v. Usborne* (1); *M'Ewan v. Smith*. (2) And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission-merchant: yet it never seems to have occurred to any one that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not "an agent intrusted" with the possession: *Kingsford v. Merry* (3); *Hardman v. Booth*. (4)

Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in *Sheppard v. Union Bank of London* (5), and afterwards by the Court of Queen's Bench, on the facts, in *Baines v. Swainson* (6), that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good.

In *Fuentes v. Montis* (7) it was decided, first by the Common Pleas, and afterwards by the Exchequer Chamber, that, after the true owner had demanded back his goods from the factor, who wrongfully refused to give them up, the factor ceased to be "intrusted," and a pledge subsequently made by him was not good. In delivering judgment, Willes, J., speaks of *Baines v. Swain-*

(1) 7 M. &amp; G. 678.

(2) 2 H. L. C. 309.

(3) 1 H. &amp; N. 503; 26 L. J. (Ex) 83.

(4) 1 H. &amp; C. 803; 32 L. J. (Ex.) 105.

(5) 7 H. &amp; N. 661; 31 L. J. (Ex.) 154.

(6) 4 B. &amp; S. 270; 32 L. J. (Q.B.) 281.

(7) Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93.

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son (1) as going to the extreme of the law, but does not express dissent from it.

Against this great mass of authority, Mr. Benjamin could produce nothing but some observations of Lord Westbury in *Vickers v. Hertz* (2); but we think, when those are rightly understood, they are not in conflict with the other decisions. The facts in *Vickers v. Hertz* (2) bear a very close resemblance to those in *Baines v. Swainson*. (1) Campbell, who was a Glasgow broker, had represented to Vickers that he had made for him a sale to a principal of a large quantity of iron. This, it seems, was a falsehood. Vickers was induced by the falsehood to send a delivery-order to Campbell. He did not intrust him with the delivery-order with a view to his making a sale, for he thought it was already made; but he did intrust him in the course of his business as agent with the document of title, that he might as such agent deliver the goods. The decision of the House of Lords was, that a pledge by Campbell was good under the Factors Acts. Lord Westbury seems to have understood Willes, J., in *Fuentes v. Montis* (3), as expressing an opinion that the Act did not embrace the case of any but a factor who was intrusted for the purpose of effecting a sale not yet made. Had Willes, J., expressed such an opinion, it would, no doubt, have been inconsistent with *Baines v. Swainson* (1), and been overruled by the House of Lords in *Vickers v. Hertz*. (2) We think, however, that he expressed no such opinion, and, consequently, that all the authorities are in unison with the decision of the Common Pleas in this case, which we therefore affirm.

BRAMWELL, B. I find as a fact in this case that Slee was in possession of this wool only as a warehouseman. He certainly was in possession of the goats' wool in that and in no other character. He got and kept possession of the sheep's wool just in the same way as he did of the goats'; and, though he usually sold the sheep's wool, it was under specific instructions; he had no general authority to do so; he acted under specific instructions. I infer that, as he did it *usually*, he did not do it always, and that there

(1) 4 B. & S. 270; 32 L. J. (Q.B.) 281.

(2) Law Rep. 2 H. L., Sc. 113.

(3) Law Rep. 3 C. P. at p. 284.

was nothing in the dealings between the parties to prevent the plaintiffs from having the sheep's wool sent to London, or employing somebody else to sell it. Moreover, his possession of the sheep's wool was not necessary to his selling it as a broker, nor, I suppose, a thing ordinarily the case with sheep's wool brokers; nothing of the sort is stated. His possession of both classes of wool was accounted for in the same way, unconnected with his being a broker, viz. by Liverpool being the port of landing, his having warehouses there, and being employed to land the wool and warehouse it in his own warehouses. I may add, though it is not material, that it does not appear that the defendants knew he had the wool nor the documents of title for it. Indeed, as to the *Grecian's* parcel, they could not know it.

These being the facts, as I view and find them, was he an agent intrusted with the possession of goods within the meaning of 5 & 6 Vict. c. 39, s. 1? The argument is that he is an agent, and that he is intrusted with the possession of the goods. But, unless we adopt a verbal construction that leads to absurdities, some limitations must be put on these words; some such limitation as "agent intrusted as such, and ordinarily having as such agent a power of sale or pledge;" otherwise, the words would include the case of an agent for the sale of one thing, say, a metal-broker intrusted with a thing unconnected with his agency, say, wool; and also the case of an agent for some purpose which neither in fact gave him power to sell or pledge, nor according to the usage of business appeared to give such power. For instance, a packer intrusted with goods, though known to be a packer by the lender of money, might pledge the goods to such lender. So a carrier, who is an agent to deliver goods from A. to B., would have power to pledge to C., who knew he was a carrier only, and as such only had possession. Because the conclusion of s. 1 protects the transaction, though the pledgee "may have had notice that the person is only an agent." But, only an agent in what sense? Surely only an agent such as the pledgee might well suppose had power to pledge. This clause and this part of it being intended to protect persons who deal with agents known to be such, who in reason may pledge because they usually make advances to those who have intrusted them with the goods. It may be said that these difficulties are met by the pro-

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vision that the transaction must be bonâ fide in the man advancing the money. But the answer is not sufficient. He might bonâ fide believe in a special authority or right to pledge, where there was none at all.

It seems to me, speaking generally, that the statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. That is not the case here. In the first place, as I have observed, the possession of the wool was not necessary to Slee's acting as broker in relation to it. But, in the next place, Slee filled two characters. If the defendants chose to trust him as the possessor of goods, without inquiring in which character he possessed them, they cannot get a title on the ground that he was in possession in fact, when he was not in possession as agent nor intrusted as such.

When I look at the terms of Slee's note to the defendants, I doubt if the defendants trusted him on account of his possession of the wool, or knew of it. The *decisions* are, in my judgment, uniform in favour of this view.

The cases are so fully considered by my Brother Blackburn, that I think it needless to go into them. I am of opinion judgment should be affirmed.

*Judgment affirmed.*

Attorneys for plaintiffs: *Clarke, Son, & Rawlins.*

Attorneys for defendants: *Chester, Urquhart, Bushby, & Mayhew, for Laes, Banner, & Co., Liverpool.*

END OF HILARY TERM, 1875.